Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
and
LUCENT TECHNOLOGIES INC.,
Petitioners,

v.

THE UNITED STATES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an aggrieved government contractor can pursue contractual remedies against the United States for violating a statutory prohibition mandating adherence to a congressional procurement policy intended to protect government contractors against significant financial risk when performing research and development essential to the national defense.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner American Telephone and Telegraph Company has no parent corporation, and there is no publicly held company that owns 10 percent or more of its stock.

Petitioner Lucent Technologies Inc. has no parent corporation, and there is no publicly held company that owns 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

This is a case about the fundamental right of government contractors to obtain judicial relief when an Executive Branch department or agency violates congressional procurement policies enacted into law as mandatory statutory requirements or prohibitions. The legal issues in this case, which implicate the integrity of the constitutionally based federal procurement system, have confounded the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Federal Claims for almost a decade. Now that the Federal Circuit has issued its third (and final) opinion, this case needs, and is ready for, Supreme Court review. Accordingly, Petitioners American Telephone and Telegraph Company ("AT&T") and Lucent Technologies Inc. respectfully request the Court to grant their petition for a writ of certiorari.

OPINIONS BELOW

The Federal Circuit's opinion (App. at 1a) is reported at 307 F.3d 1374. The Court of Federal Claims opinion, which the Federal Circuit affirmed, is reported at 48 Fed. Cl. 156 (App. at 21a). Other opinions and orders issued in this case are reported at 177 F.3d 1368 (en banc opinion) (App. at 33a); 136 F.3d 793 (accepting suggestion to rehear appeal en banc and vacating panel opinion) (App. at 73a); 124 F.3d 1471 (panel opinion) (App. at 75a); 33 Fed. Cl. 540 (certifying issues for interlocutory appeal) (App. at 104a); and 32 Fed. Cl. 672 (App. at 108a).

JURISDICTION

The final judgment of the court of appeals was entered on October 8, 2002. A timely petition for rehearing

en banc was denied on January 27, 2003 (App. at 19a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 8118 of the Defense Appropriations Act of 1988, provided as follows:

> None of the funds provided for the Department of Defense in this Act may be obligated or expended for fixed price-type contracts in excess of $10,000,000 for the development of a major system or subsystem unless the Under Secretary of Defense for Acquisition determines, in writing, that program risk has been reduced to the extent that realistic pricing can occur, and that the contract type permits an equitable and sensible allocation of program risk between the contracting parties: Provided, That the Under Secretary may not delegate this authority to any persons who hold a position in the Office of the Secretary of Defense below the level of Assistant Secretary of Defense: Provided further, That the Under Secretary report to the Committees on Appropriations of the Senate and House of Representatives in writing, on a quarterly basis, the contracts which have obligated funds under such a fixed price-type developmental contract.

Act of Dec. 22, 1987, Pub. L. No. 100-202, § 8118, 101 Stat. 1329, 1329-84.

STATEMENT OF THE CASE

This case raises the question of whether the Department of Defense ("DoD") – or any federal department or agency – can violate a procurement statute that was

intended to protect the interests of government contractors, profit from that violation to the great financial detriment of government contractors, and then avoid all judicial redress when an aggrieved government contractor files suit in the U.S. Court of Federal Claims. The U.S. Court of Appeals for the Federal Circuit and the Court of Federal Claims have struggled with this issue and case for almost ten years. As the tangle of inconsistent opinions previously issued in this case reflect (*see* Appendix, *infra*), both courts have been perplexed, and the court of appeals has been divided, over the legal issues presented by DoD's indisputable violation of a mandatory statutory prohibition against use of fixed-price research and development contracts for major military defense systems. The opinion below is the third (and final) of three, contradictory, Federal Circuit opinions (including an earlier, *en banc* opinion), each of which was issued over a sharply worded dissent.

In the opinion below, a majority panel of the court of appeals held that despite DoD's clear-cut violation, no judicial relief is available where, as is virtually always the case, the procurement statute imposing the requirement or prohibition that has been violated does not also include an explicit right of action. Thus, according to the opinion below, a contractor aggrieved by such a violation cannot pursue traditional contractual remedies, such as compensation based on reformation of an illegal contract term, or *quantum meruit* recovery based on an implied-in-fact contract. As a result of DoD's violation (which was one of many DoD violations of the same or similar statutes), Petitioner AT&T lost more than $55 million in performing research and development that was essential to the national defense. Now AT&T and its successor-in-interest, co-Petitioner Lucent Technologies Inc., after a decade of litigation, have been denied the right to seek any judicial relief.

1. The United States Government heavily depends upon contractors to provide an almost endless list of goods and services. This includes extremely complex research and development needed for military defense systems, and also for other essential purposes such as homeland security. DoD normally procures new military defense systems through award of research and development contracts, which due to the nature of the work, involve long-term contractual commitments, technological obstacles, and extraordinary financial risks. Thus far in FY 2003, Congress has appropriated more than $130 billion for defense-related procurement, including for state-of-the-art research and development. *See* Kerry Gildea, *Bush Signs $355 Billion Defense Appropriations Bill*, Defense Daily, Oct. 24, 2002.

At the nation's founding it was assumed that pursuant to the War Powers vested in Congress by Article I of the Constitution, most military weapons would be designed and manufactured by the Government in its own "Arsenals" and "dock-Yards." U.S. Const. art. I, § 8, cl. 17. But what has evolved, particularly during the last century, is a base of private contractors essential to the development and production of military defense systems which are vastly more complex than the Founders could have envisioned. There is a necessary partnership between the Government and this "defense industrial base." As discussed below, the federal procurement statute at issue here expressly recognized the need to preserve that relationship.

Despite their critically important role, government contractors have very little bargaining power regarding the terms and conditions of the contracts upon which they bid. *See* John Cibinic, Jr., *Retroactive Legislation and Regulations and Federal Government Contracts*, 51 Ala. L. Rev. 963, 975 (2000) ("Most government contracts, regardless of type, are contracts of adhesion which leave little or no room for negotiation of terms."). Instead, the

Federal Acquisition Regulation ("FAR"), 48 C.F.R. Part 52, and FAR supplements issued by individual departments and agencies, set forth a myriad of required contract clauses. Nevertheless, Congress sometimes acts to protect the interests of contractors – especially contractors which comprise the nationally vital, defense industrial base – by including in particular authorization, appropriation, or other procurement-related statutes, specific requirements or prohibitions relating to certain material contract terms. Such terms include, for example, the basis on which a contractor will be paid for its work (e.g., fixed-price basis; cost-reimbursement basis). The Executive Branch, including DoD, must adhere to Congress' statutory requirements and prohibitions when awarding contracts.

2. The statute at issue in this appeal, § 8118 of the Defense Appropriations Act of 1988, addressed Congress' longstanding concern about DoD's persistent use of fixed-price contracts (rather than cost-reimbursement contracts) for technologically challenging, financially risky, research and development projects involving major military defense systems. As the court of appeals explained in its earlier, *en banc* opinion in this case, a House Appropriations Committee investigation had "concluded that for the development phases of new technologies, the Navy's use of fixed price contracting resulted in program delays, cost overruns, contractor claims, non-participation, and litigation." App. at 37a. In view of "congressional concern that the risks of failure and of cost uncertainties be allocated equitably between government and contractor [and] the desire to '*maintain the government's credibility as a reliable business partner*' . . . Congress acted to adjust the risks of developing the advanced technologies needed in the service of national defense" by enacting § 8118. *Id.* at 39a (quoting H.R. Conf. Rep. No. 100-498, at 623 (Dec. 22, 1987)) (emphasis added).

Section 8118 prohibited the use of appropriated funds to award "fixed price-type contracts in excess of $10,000,000 for the development of a major system or subsystem unless the Under Secretary of Defense for Acquisition determines, in writing, that program risk has been reduced to the extent that realistic pricing can occur, and that the contract type permits an equitable and sensible allocation of program risk between the contracting parties." Pub. L. No. 100-202, § 8118. The statute further provided that "the Under Secretary report to the Committees on Appropriations of the Senate and House of Representatives in writing, on a quarterly basis, the contracts which have obligated funds under such a fixed price-type developmental contract." *Id.*

As the Court of Federal Claims explained in its initial opinion in this case, "[q]uite plainly, then, the statute has more than the Government's own interests in mind." App. at 121a. The statute "reflects a concern for sound contracting policies that encompasses the interests of *both parties – contractors* as well as the Government." *Id.* (emphasis added).

3. On December 31, 1987, very soon after § 8118 was enacted, the Navy awarded to AT&T a fixed-price research and development contract for procurement of the reduced diameter array ("RDA") system, a new detection technology for tracking ultra-quiet Soviet submarines. The opinion below confirms (as do each of the earlier opinions in this case) that "[*c*]*ontrary to that section's provisions*, the Navy awarded the RDA contract [on a fixed-price basis] without the Under Secretary of Defense for Acquisition's written determination that RDA program risk had been reduced so that realistic pricing could occur." App. at 4a (emphasis added). AT&T was not aware of DoD's violation of § 8118 at the time the RDA contract was awarded.

"The Government does not dispute that the requirements of § 8118 were not met by the Department of Defense." App. at 42a. Indeed, despite the enactment of § 8118 in 1987 and similar provisions in subsequent years' defense appropriations bills, DoD *repeatedly* and *knowingly* violated Congress' statutory prohibition by awarding, in the absence of any determination that "realistic pricing can occur," *numerous* fixed-price research and development contracts for procurement of various major military defense systems. Petitioners believe that the costs of performing those contracts have exceeded the fixed prices paid by DoD by *hundreds of millions* of dollars. Several of those procurements are now the subject of pending litigation within the Federal Circuit.

The fixed price for the RDA contract was approximately $36 million. AT&T performed the contract successfully over a period of five years. It developed, tested, and produced the RDA detection system, which the Navy then utilized to track the new generation of ultra-quiet Soviet/Russian submarines. Nevertheless, during the course of developing the RDA system, AT&T encountered numerous unforeseen technological challenges and obstacles, which caused its costs of performance to exceed the fixed contract price by at least $55 million. *See id.* at 4a; 16a-17a. Under a cost-reimbursement contract, as contemplated by § 8118, AT&T would have been compensated for those costs.

During the course of performing the fixed-price contract, AT&T advised the Navy that it was incurring huge losses. The Navy, however, showed no sympathy. For example, "[i]n order to gain some relief from this situation and to help bring costs under control, AT&T contacted the Navy in 1991 asking the procuring activity . . . not to exercise its production system options under the contract." *Id.* at 113a. In making this request, AT&T "called attention

to 'statutory restraints on the use of R&D . . . funds for fixed price contracts.' " *Id.* But the Navy turned down AT&T's request and exercised its production system options. The record indicates that the Navy took this action despite earlier being advised by the Acting Under Secretary of Defense for Acquisition that "the use of [fixed-price] production options obtained before the start of full-scale development contracts [place] excessive financial risk on contractors," and that such fixed-price research and development contracts "generally cause contractors large losses if the production options are actually exercised." Mem. from Don Yockey, Acting Under Secretary of Defense, Acquisition, to Secretaries of the Military Departments (Att: Service Acquisition Executives) (Apr. 15, 1991).

In December 1992, AT&T submitted to the Navy contracting officer a claim alleging, *inter alia*, that the Navy's use of a fixed-price contract violated § 8118. The contracting officer denied AT&T's claim in June 1993. App. at 109a-110a.

4. In August 1993, AT&T filed a Complaint against the United States in the Court of Federal Claims, citing the Tucker Act, 28 U.S.C. § 1491, and Contract Disputes Act, 41 U.S.C. §§ 601-613, as the bases for jurisdiction. AT&T alleged that as a result of the Navy's violation of § 8118, the RDA contract should be reformed from a fixed-price contract to a cost-reimbursement contract, and as a result, that it is entitled to recover its unpaid costs plus a reasonable profit. Alternatively, AT&T alleged that the contract was void at the time of the award and that it is entitled to recover on a *quantum meruit* basis under an implied-in-fact contract.

After considering the parties' cross motions for summary judgment, the court (Judge Wiese) ruled that the Navy had violated § 8118; that the resultant contract was

void *ab initio*; and that AT&T should be compensated on a *quantum meruit* basis, but that further factual development was needed to determine the appropriate amount. *AT&T I*, 32 Fed. Cl. 672 (App. at 108a). The court subsequently certified its opinion for interlocutory appeal. 33 Fed. Cl. 540 (1995) (App. at 104a).

On interlocutory appeal, the Federal Circuit panel majority (Circuit Judges Plager and Rader) agreed that § 8118 "operates as a constraint on the contracting process intended for the protection of both Government and contractor;" that DoD violated § 8118; and as a result, that the contract was void *ab initio*. *AT&T II*, 124 F.3d at 1478 (App. at 92a). The court further held that because DoD had no authority to enter into a contract that violated § 8118, AT&T was not entitled to any form of contractual relief. *Id.* Circuit Judge Newman filed a dissenting opinion, contending that the fully performed contract was not invalid. App. at 97a. The court of appeals then accepted AT&T's suggestion to rehear the appeal *en banc*, and as a result, vacated and withdrew the *AT&T II* judgment. 136 F.3d 793 (App. at 73a).

The ensuing *en banc* opinion (authored by Circuit Judge Newman and joined by Circuit Judges Clevenger, Schall, Bryson, and Gajarsa) held that although the Navy failed to comply with § 8118, that did not render the fully performed contract void *ab initio*. *AT&T III*, 177 F.3d 1368 (App. at 33a). The *en banc* plurality indicated that "[w]hen a contract or a provision thereof is in violation of law but has been fully performed, the courts have variously sustained the contract, reformed it to correct the illegal term, or allowed recovery under an implied contract theory; the courts have not, however, simply declared the contract void ab initio." App. at 48a. The opinion did not reach "the issue of what relief may be available to AT&T." *Id.* at 49a. Circuit Judge Rader, joined by Chief Judge Mayer and Circuit Judge

Lourie, filed a separate opinion concurring in the result, but contending that § 8118 did not apply to the RDA contract. *Id.* at 51a. Circuit Judge Plager filed a separate dissenting-in-part and concurring-in-part opinion, which contended that § 8118 was applicable; that DoD's violation rendered the contract invalid; but that AT&T is not entitled to any additional compensation. *Id.* at 55a.

Following remand of the case to the Court of Federal Claims, AT&T, joined by Lucent, filed an Amended Complaint, which repeated the original grounds for relief based on DoD's violation of § 8118. The Amended Complaint also included several additional theories of recovery. *See* App. at 24a. The Government then moved to dismiss for failure to state a claim upon which relief can be granted. Judge Wiese, who in *AT&T I* had found that § 8118 "encompasses the interests of . . . contractors" as well as the Government, granted the Government's motion to dismiss in *AT&T IV*, 48 F.3d 156, holding (for the first time in the litigation) that "plaintiffs cannot claim a protectable interest in the proper application of Section 8118 for Congress intended to give them none." App. at 121a; 30a.

AT&T and Lucent appealed to the Federal Circuit.

5. In *AT&T V*, 307 F.3d 1374 (App. at 1a), the court of appeals affirmed the Court of Federal Claims dismissal of the action. App. at 1a. According to the majority opinion (authored by Circuit Judge Rader and joined by Circuit Judge Prost),

> [t]he language of section 8118 *does not explicitly create a cause of action* for enforcement of its expenditure prohibitions. Instead the only explicit provision with enforcement consequences in section 8118 requires quarterly reports to the 'Committees on Appropriations . . .' Thus, *section 8118*

> *envisions enforcement, if any, through legislative procedures*. The language permits the appropriate legislative committees to monitor compliance and, presumably, guarantee enforcement in the form of future reductions in, or limitations on, appropriated funds. . . . Thus *section 8118 is an appropriations oversight provision* that envisions enforcement, if any, in the form of legislative spending adjustments in future bills. Section 8118 *does not make any provision for judicial enforcement.*
>
> * * *
>
> In sum, the language of section 8118 provides for *legislative oversight and enforcement.* The section *does not create a cause of action* inviting private parties to *enforce* the provision in courts.

Id. at 6a-8a (emphasis added). The majority indicated in the alternative that it "would be forced to conclude that AT&T waived its present arguments even were those arguments to state a valid claim." *Id.* at 11a. According to the court, "the proper time for AT&T to have raised the issues that it now presents was at the time of contract negotiation, when effective remedy was available." *Id.* at 13a.[1]

Circuit Judge Newman, who authored the Federal Circuit's earlier, *en banc* opinion, dissented to the majority opinion in *AT&T V*. She asserted that

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[1] The court also rejected, as "entirely unpersuasive," AT&T's additional allegations "that the Navy violated a variety of procurement regulations and directives that guide a contracting officer's selection of contract type." App. at 9a, 11a.

> the Court of Federal Claims [in *AT&T IV*] limited its consideration to the role of Section 8118, *despite the Federal Circuit's remand to consider the issue of relief.* This [*AT&T V*] panel also does not reach the issue of the remand. Instead, the panel majority simply restates and reexplains this court's prior ruling that violation of Section 8118 does not render a fully performed contract void *ab initio*.
>
> . . . I do not know whether this contract warrants relief. But it is *incorrect to hold that the facts are irrelevant and that there can be no relief* unless Section 8118 is enforceable by AT&T. *AT&T has not yet had its day in court*.

Id. at 18a (emphasis added).

Following issuance of the opinion below, AT&T and Lucent filed a petition for rehearing *en banc*, which the court denied. Thus, almost ten years after commencement of this litigation, and after two Court of Federal Claims opinions and three Federal Circuit opinions, AT&T and Lucent still are seeking judicial relief for the substantial financial harm they suffered as a result of DoD's undisputed violation of § 8118's prohibition against award of fixed-price research and development contracts.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION PRESENTED HAS FAR-REACHING IMPLICATIONS FOR MAINTAINING THE INTEGRITY OF THE FEDERAL PROCUREMENT SYSTEM AND IS EXCEPTIONALLY IMPORTANT TO CONTRACTORS COMPRISING THE DEFENSE INDUSTRIAL BASE

The issue in this appeal is whether the Executive Branch can violate, with no judicial consequences whatsoever, a statute which mandates adherence to a significant, carefully considered, clearly articulated, congressional procurement policy – here, intended to protect contractors comprising the defense industrial base against substantial financial risks when performing research and development on major military systems. The surpassing importance of this question transcends even the vital subject of national defense procurement. It implicates the integrity of the entire federal procurement system and warrants the Court's immediate review.

The Court of Federal Claims explained in *AT&T IV* that § 8118 is a provision

> that *prohibited* the Department of Defense from either obligating or expending appropriated funds on fixed-price contracts involving the acquisition of major systems or sub-systems in excess of $10 million, absent a determination in writing that "program risk has been reduced to the extent that *realistic pricing* can occur, and that the contract type permits an *equitable* and *sensible* allocation of program risk between the contracting parties."

App. at 22a-23a (emphasis added). The court further explained that "[a]lthough the contract that the Navy awarded to AT&T in 1987 came within the scope of Section 8118 . . . the determination required by the statute was never made." *Id.* at 23a. As indicated above, DoD's violation of § 8118's prohibition against award of fixed-price research and development contracts ultimately cost AT&T more than $55 million. In *AT&T III*, the *en banc* court of appeals remanded the case to the Court of Federal Claims for a determination regarding the appropriate form of contractual relief to which AT&T is entitled. *See* App. at 34a; *see also id.* at 18a (Newman, J., dissenting) (discussing "the Federal Circuit's remand to consider the issue of relief"). Now, in *AT&T V*, the court of appeals has reversed itself by holding that Petitioners have failed to state a claim upon which relief can be granted. App. at 1a.

Unfortunately, DoD's failure to comply with § 8118 in connection with award of the RDA contract to AT&T was not an isolated occurrence. There are at least three other suits against the United States pending in the Court of Federal Claims, where other defense contractors collectively are seeking to recover almost a *billion* dollars in contract losses on the ground that DoD violated § 8118 (or its successors) to their financial detriment by utilizing fixed-price research and development contracts for procurement of major military systems. *See Short Bros., PLC v. United States*, No. 98-894C (filed Nov. 25, 1998) (involving research and development of Army National Guard aircraft); *Northrop Grumman Corp. Military Aircraft Div. v. United States*, No. 96-760C (filed Dec. 2, 1996) (involving research and development of a multiservice attack missile); *CTA Inc. v. United States*, No. 96-113C (filed Feb. 23, 1996) (involving research and development of a simulator system for Air Force navigational training) (the CTA case is being held in abeyance pending the outcome of the *AT&T* appeal).

There also are other pending cases against the United States where a contractor claims that it is entitled to contractual relief based on a DoD violation of a statute or regulation that governs material contract terms. For example, in *Gould, Inc. v. United States*, No. 95-88C (Fed. Cl. filed Feb. 12, 1988), the contractor claims that it is entitled to reformation of a multi-year contract that provided for research and development of radios meeting certain Navy performance specifications. The contractor, which is seeking tens of millions of dollars in monetary relief, contends that in awarding the contract, the Navy violated a 1982 procurement statute, 10 U.S.C. § 2306(h)(1)(D) (1982), by failing to provide a "stable design" for the radios. The litigation has been pending for many years. Nevertheless, on April 4, 2003 the Government filed a cross-motion for summary judgment arguing – based on the *AT&T* opinion below – that "the Federal Circuit unquestionably has established the principle that funding statutes . . . are not judicially enforceable by contractors." Defendant's Cross-Motion for Summary Judgment at 13, *Gould* (No. 95-88C). According to the Government, "[t]here is *no material distinction between the statutes in Gould and AT&T*." *Id.* (emphasis added). Thus, in its recent brief in *Gould*, the Government argues the Federal Circuit's opinion below has broad applicability, and implicitly acknowledges that the statutory "enforceability" issue is squarely presented by the *AT&T* case.

If the opinion below is allowed to stand, the adverse consequences for both the defense industrial base and the federal procurement system will be profound. DoD will interpret the opinion as giving it free reign to violate, whenever in its economic interests to do so, mandatory statutory requirements or prohibitions which Congress has determined are needed to preserve the defense industrial base. At the very least, unless the opinion is reversed, the

integrity of congressional procurement policies, and the credibility of DoD as a contracting party, would be seriously undermined. Indeed, one of the very reasons why Congress enacted § 8118 was "*to maintain the government's credibility* as a reliable business partner." H.R. Conf. Rep. No. 100-498, at 623 (1987) (emphasis added). Yet, Congress has observed that DoD has continued to exhibit an unmistakable pattern of noncompliance with statutory, procurement-related requirements and prohibitions. *See, e.g.*, H.R. Rep. No. 106-244, at 8, 10 (1999) (expressing, in connection with the Department of Defense Appropriations Bill of 2000, the House Appropriations Committee's concern for "ensuring that funds made available in appropriations acts are in fact put to the use intended by the elected members of Congress, *under the terms and conditions the Congress and the House and Senate Appropriations Committees place on the funding in question*," and asserting that "the Committee simply *cannot excuse violations of appropriations and acquisition law, regulation and practice*") (emphasis added).

Depriving aggrieved contractors of all judicial remedies when a federal department or agency violates a statutory or regulatory, contract-related requirement or prohibition, especially where, as here, it was enacted for the protection of contractors (as well as the Government), would be a powerful disincentive for doing business with the Government. This is particularly true in connection with long-term, high financial risk, research and development necessary for the national defense. The resultant decrease in competition for such work may impede government access to new technologies and drive contract prices higher.

Moreover, where, as here, the Government's violation subsequently causes a contractor to incur a substantial financial loss, both the contractor and the

Government are harmed. *See, e.g., Better Acquisition Outcomes Are Possible if DOD Can Apply Lessons from F/A-22 Program*, 108th Cong. 16 (2003) (Statement of David M. Walker, Comptroller General of the United States, House Comm. on Government Reform) (discussing DoD's "high risk [procurement] approach whose outcomes so far have been increased cost, quality and reliability problems, growing procurement reductions, and delays"). As Eleanor R. Spector, former Deputy Assistant Secretary of Defense for Procurement, explained when asked about cost overruns caused by fixed-price research and development contracts, "[i]t *hurts our industrial base* . . . It's *not a fair way* to treat our contractors." David F. Bond, *Defense Contractors Industry Controls Effort, Costs In Fixed-Price Development Losses*, Aviation Week & Space Technology, Sept. 3, 1990, at 179 (emphasis added). Yet, the record of this case includes an internal DoD memorandum, provided to Ms. Spector to help her prepare for the interview leading to the cited *Aviation Week* article, which advised her that "use [of] cost-type contracts for complex major weapon system development efforts [was] *never enforced* in a specific program." Mem. from Charles Zuckerman to Eleanor Spector (July 5, 1990) (emphasis added).

Each of the Federal Circuit and Court of Federal Claims opinions rendered in this case confirms that DoD violated § 8118 by awarding the RDA contract to AT&T on a fixed-price basis.[2] DoD's indisputable violation makes this

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[2] *See AT&T V*, App. at 4a ("Contrary to [§ 8118's] provisions, the Navy awarded the RDA contract . . . ."); *AT&T IV*, App. at 30a (discussing the Navy's "non-compliance with the statute"); *AT&T III*. App. at 43a (discussing the "question of the consequences of this failure of compliance by the Department of Defense"); *AT&T II*, App. at 80a ("No valid contract was or could be entered into in

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a perfect vehicle for the Court to resolve the question of whether traditional contractual remedies are available to aggrieved government contractors when federal departments or agencies violate statutory requirements or prohibitions that govern material contract terms.

II. REVIEW IS NEEDED TO RESTORE CLARITY AND CONSISTENCY REGARDING THE AVAILABILITY OF CONTRACTUAL REMEDIES WHEN A FEDERAL DEPARTMENT OR AGENCY VIOLATES A STATUTORY OR REGULATORY REQUIREMENT GOVERNING MATERIAL CONTRACT TERMS

According to the majority opinion below, the absence of an explicit right of action in § 8118, coupled with the statute's ancillary reporting ("congressional oversight") clause, deprives Petitioners of all contractual remedies, despite the tens of millions of dollars that AT&T lost as a result of DoD's violation of the statute. *See* App. at 16a-17a. The majority opinion not only is erroneous, but also appears to create a *broad, new principle* that is patently inconsistent with a long line of Federal Circuit cases granting relief to contractors aggrieved by illegal contract terms or contracts. Indeed, in its earlier, *en banc* opinion, the court of appeals explicitly *relied* on that same precedent. The court explained that "[w]hen a contract or a provision thereof is in *violation of law* but has been fully performed, the courts have

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(Footnote cont'd from previous page.)

the face of the express congressional prohibition."); *AT&T I*, App. at 126a-127a ("The action taken by the Department of Defense is contrary to the clearly expressed intent of Congress and is therefore contrary to law.").

variously sustained the contract, *reformed it to correct the illegal term*, or *allowed recovery under an implied contract theory*." *Id.* at 16a (collecting cases) (emphasis added).

No prior case has held that an authorization, appropriations, or other procurement-related statute (or regulation) must contain an explicit right of action in order for a contractor to be entitled to such traditional contractual remedies where, as here, a federal department or agency violates the statute's requirements or prohibitions relating to material contract terms (e.g., pricing terms). For example, in *Gould, Inc. v. United States*, 67 F.3d 925 (Fed. Cir. 1995), the contractor sought compensation based on an implied-in-fact contract theory. The Federal Circuit rejected, for the second time, the Government's contention that the contractor failed to state a claim upon which relief can be granted. As indicated above, the case has returned to the Court of Federal Claims, and the Government now is seeking summary judgment based on *AT&T*.

Similarly, in *Urban Data Systems, Inc. v. United States*, 699 F.2d 1147 (Fed. Cir. 1983), the Federal Circuit affirmed a General Services Administration Board of Contract Appeals ruling that a contract was invalid because the Small Business Administration had violated a statutory prohibition against cost-plus-percentage-of-cost contracts. The court of appeals agreed that the contractor "is entitled to reimbursement on a *quantum valebant* basis" under an implied-in-fact contract. *Id.* at 1154. The pertinent procurement statutes did not include an explicit right of action. Other precedent allowing recovery under implied contracts to redress Government violations of procurement statutes or regulations, despite the absence of an explicit statutory right of action, includes *Barrett Refining Corp. v. United States*, 242 F.3d 1055, 1060 (Fed. Cir. 2001) ("Given that the price escalation clause was unauthorized and

unenforceable, we agree with the Court of Federal Claims' implicit legal conclusion that there was . . . nothing to preclude an implied-in-fact agreement on that term."); *New England Tank Industries of New Hampshire, Inc. v. United States*, 861 F.2d 685, 694-95 (Fed. Cir. 1988) (recognizing claim based on violation of funding regulation); *United States v. Amdahl Corp.*, 786 F.2d 387, 395 (Fed. Cir. 1986) (recognizing entitlement under an implied-in-fact contract based on violation of a procurement statute prohibiting advance payments); *see also Clark v. United States*, 95 U.S. 539, 541-42 (1877) (allowing recovery against the United States for *quantum meruit* under an implied contract where the Government violated the statute of frauds' requirement that contracts be in written form).

There also is a long line of cases which, despite the absence of an explicit statutory right of action, have provided equitable relief to aggrieved contractors by reforming otherwise legal contracts to add or change contract clauses where the Government has violated procurement statutes or regulations. For example, in *LaBarge Products, Inc. v. West*, 46 F.3d 1547, 1552 (Fed. Cir. 1995), the Federal Circuit recognized "the equitable principle of contract reformation when a contract has been written in violation of a law or regulation enacted for the benefit of prospective contractors." Similarly, in *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1186 (Fed. Cir. 1988), the court of appeals explained that if a contract violates procurement regulations, "then reformation is appropriate." *See also Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1447 (Fed. Cir. 1997) (citing *LaBarge Products, Inc.*); *Applied Devices Corp. v. United States*, 591 F.2d 635, 640-41 (Ct. Cl. 1979) (holding that the contractor was entitled to reformation because the contract violated regulations governing cancellation ceilings that were adopted to protect contractors); *Chris Berg, Inc. v. United States*, 426 F.2d 314,

317-18 (Ct. Cl. 1970) (holding that the contractor was entitled to reformation of the contract price because the Government violated certain regulations that were adopted to protect contractors); *see generally G. L. Christian & Assoc. v. United States*, 312 F.2d 418 (Ct. Cl. 1963) (indicating that the court will reform government contracts by incorporating into them clauses that are required by law).

Yet, the seeming new legal principle announced by the Federal Circuit in this case is that a government contractor aggrieved by an Executive Branch violation of a contract-related requirement or prohibition contained in a procurement statute is not entitled to judicial relief unless the statute also includes an explicit right of action, even where, as here, the statute is intended to protect the contractor as well as the Government. This holding suddenly and unavoidably casts a broad, dark shadow of doubt across the body of federal common law precedent involving judicial relief for illegal contracts or contract terms (such as illegal pricing terms).

For example, in a recent Armed Services Board of Contract Appeals ("ASBCA") case, a contractor sought, *inter alia*, reformation of a contract from "firm-fixed price" to "total cost." *Appeals of Randolph & Co., Inc.*, ASBCA Nos. 52953-52959, 2002 WL 31501912 (Nov. 6, 2002). In its decision, the ASBCA indicated that "for legal authority, [the contractor] cites *LaBarge Products, Inc.*," *supra*, and other cases. *Id.* But the ASBCA further indicated that based on the Federal Circuit's opinion in *AT&T V*, "there is no basis here for equitable reformation." *Id.* In denying the contractor's motion for reconsideration, the ASBCA explained that "[i]t was not necessary to analyze appellant's argument more closely given the *authoritative and dispositive nature* of the cited [*AT&T V*] court decision." *Appeals of Randolph & Co., Inc.*, ASBCA Nos. 52953-

52959, 2003 WL 139510 (Jan. 13, 2003); *see also Information Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1323 (Fed. Cir. 2003) (discussing *AT&T V*); *C.W. Over & Sons, Inc. v. United States*, 54 Fed. Cl. 514, 522 (2002) (same).

Thus, the opinion below, which has the potential for eroding the defense industrial base upon which the Government and the public so heavily depend, already has commanded deferential treatment. *See generally* R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice 264, 265 (8th ed. 2002) (explaining that because of the Federal Circuit's exclusive jurisdiction over claims "involving many of the legal obligations of the United States . . . [t]he issues arising in this type of litigation . . . can have a *special importance* that warrants review by the Supreme Court," and that "the decisions of the Federal Circuit . . . *alone* often settle the law in the absence of Supreme Court review") (emphasis added).

Further, as discussed above, there are additional pending cases in which contractors are seeking contractual remedies and hundreds of millions of dollars in relief from the United States on the ground that DoD violated § 8118 or other procurement statutes requiring or prohibiting particular contract terms. The Government has been using the opinion below aggressively in seeking to deprive such contractors of judicial remedies. For these reasons, there is a *pressing need* for restoration of clarity and consistency within the Federal Circuit, the Court of Federal Claims, and boards of contract appeals, which only the Supreme Court can provide.

The immediate need for Supreme Court review also is underscored by the *patently contradictory manner* in which this case itself has been handled by both the Federal Circuit and Court of Federal Claims over the course of the

past decade. For example, in *AT&T I*, the trial court unequivocally found that § 8118 "[q]uite plainly . . . has more than the Government's own interests in mind," and that the statute "encompasses the *interests of . . . contractors* as well as the Government." App. at 121a (emphasis added). The *AT&T II* opinion (superseded by *AT&T III*) expressly affirmed this conclusion. *See* App. at 90a. But in *AT&T IV* (affirmed by the *AT&T V* opinion below), the same trial court inexplicably found that Petitioners cannot state a claim upon which relief can be granted, in part on the ground that they "*cannot claim a protectable interest* in the proper application of Section 8118 for Congress intended to give them none." *Id.* at 30a (emphasis added).

Along the same lines, in *AT&T III*, the *en banc* court of appeals specifically acknowledged the ample case law granting relief in the form of reformation to correct illegal contract terms or *quantum meruit* recovery under an implied contract, and remanded the case for a determination as to the contractual relief to which Petitioners are entitled in view of the Navy's violation of § 8118. *Id.* at 48a-49a. But in the *AT&T V* opinion below, the panel majority (over the strong dissent of Circuit Judge Newman, who wrote the earlier, *en banc* opinion) affirmed the trial court's ruling in *AT&T IV* that despite the Navy's violation of § 8118, the Petitioners cannot state a claim upon which relief can be granted. *Id.* at 14a.

To compound this inconsistency and confusion, the author of the opinion now at issue has repeatedly changed his position during the course of the litigation. He joined in *AT&T II*'s majority holding that § 8118 was intended to protect both contractors and the Government; that § 8118 *applied* to the RDA contract; and that the contract was void *ab initio* because of DoD's violation of the statute. Then, in *AT&T III*, he filed a separate opinion contending that § 8118

is *inapplicable* to the contract. Now, in *AT&T V*, he has opined that although § 8118 *is* applicable to the contract and DoD violated the statute in awarding the contract, Petitioners are not entitled to judicial relief because they have no protectable interest.

These and other judicial perturbations in this litigation provide another compelling reason for the Court's review.

III. THE FEDERAL CIRCUIT'S HOLDING IS CLEARLY ERRONEOUS

Besides creating a new principle which directly conflicts with the Federal Circuit's own precedent, the majority opinion's legal analysis is patently incorrect.

First, the opinion is predicated upon a *fundamental mischaracterization* of Petitioners' suit, which is *not* for "enforcement" of § 8118. The opinion speculates that Congress, through monitoring and oversight, might have been able to "guarantee enforcement in the form of *future* reductions in, or limitations on, appropriated funds." App. at 6a (emphasis added). Petitioners, however, are not attempting to usurp that legislative function. Nor are they attempting to act as private attorneys general seeking to compel future compliance with a statutory prohibition which both the Federal Circuit and Court of Federal Claims squarely held DoD violated *sixteen years ago*. Instead, Petitioners are aggrieved contractors which seek traditional contractual remedies and monetary relief for the harm caused by DoD's egregious violation of § 8118's prohibition against fixed-price research and development contracts.

Thus, the premise of the opinion below, that "section 8118 envisions *enforcement*, if any, through legislative

procedures," is *wholly irrelevant* to Petitioners' claim. *Id.* at 6a (emphasis added). Legislative "enforcement" of a statutory prohibition through congressional oversight and prospective legislation, and judicial relief necessitated by a federal department's prior violation of the same statutory prohibition, are not mutually exclusive. Also, the ancillary requirement in § 8118 that DoD provide reports to congressional appropriations committees regarding contracts which DoD determined *qualified* for the limited statutory exception to the statutory prohibition against fixed-price contracts, belies the majority opinion's notion that § 8118 provided for legislative "enforcement." This is because the reports required by § 8118 assume *compliance* with the statute's exception for situations where "realistic pricing can occur." Where, as here, DoD *violates* the statute, nothing in § 8118 would trigger congressional reporting or oversight, or legislative enforcement.

Furthermore, the majority opinion's interpretation of § 8118 unjustifiably relies upon a *post hac* "legislative history" statement from a 1988 report issued by the Senate Armed Services Committee (even though the House Appropriations Committee was responsible for drafting § 8118) to support the proposition that the statute should "not be used as the basis for litigating the propriety of an otherwise valid contract." App. at 8a (citing S. Rep. No. 100-326, at 105 (1988)). As Circuit Judge Plager discussed in his separate opinion in *AT&T III*, however, "this so-called legislative history is not history" since it appeared in a report that was "written *after* § 8118 was enacted in 1987, and relate to *later-considered* legislation." App. at 62a (Plager, J., dissenting in part and concurring in part) (emphasis partially in original). "How the views of a later Congress, not contained in actual legislation, can be seen as amending or modifying prior legislative acts, is not explained." *Id.* at 62a-63a; *see generally Cipollone v. Liggett Group, Inc.*, 505

U.S. 504, 520 (1992) (" 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one' ") (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

Moreover, as Circuit Judge Plager explained, "when examined, even the terms in which the language of the 1988 Senate Report was written . . . fail to support the court's view." App. at 63a. For example, "the very next sentence in the [Senate] Report is 'Nothing in this section shall be construed to affect the requirements of section 8118 of the Department of Defense Appropriations Act, 1988.' " *Id.* Instead, "[t]he only consistent thread in [the legislative history] is the expression of *congressional irritation and frustration with the DoD's (or at least the Navy's) stubborn insistence on doing what Congress wanted stopped*" (i.e., awarding fixed-price research and development contracts). *Id.* (emphasis added).

Second, the panel majority's alternative discussion on waiver is erroneous as a matter of law. This Court long has held that an illegality in a contract generally cannot be waived. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 81 n.6 (1982); *McMullen v. Hoffman*, 174 U.S. 639, 658 (1899). The rationale underlying these decisions is that neither courts nor contracting parties have the right to waive a requirement imposed by law. Indeed, the cases cited by the *en banc* majority in *AT&T III* confirm this well established principle. App. at 48a (citing *LaBarge*, 46 F.3d at 1552-53 and *Beta Systems*, 838 F.2d at 1185). Further, as Circuit Judge Newman indicated in her dissent in *AT&T V*, the majority opinion's discussion regarding AT&T's supposed "waiver" of its arguments is based on "speculative theories [not] developed in the record." App. at 17a (Newman, J., dissenting).

The majority opinion below asserts that "this court is not inclined to change the rules and the scoring after the game has been played." App. 12a. But one of the "game's" unequivocal rules, established by Congress, is the prohibition against DoD procuring research and development of major military systems on a fixed-price basis, unless the contract qualified for the statutory exception and the required written findings were made in advance of contract award. DoD, at the outset of the "game," utterly ignored that statutory prohibition to the subsequent financial detriment of AT&T. Now all that AT&T and Lucent are asking the lower courts to do is "score" the contract in accordance with Congress' rule by granting traditional contractual remedies, and pursuant to those remedies, by awarding appropriate monetary relief.

This Court should grant review and reverse the opinion below so that Petitioners can obtain judicial relief. Holding that government contractors can pursue contractual remedies when aggrieved by Executive Branch violations of federal procurement statutes also would restore integrity and stability to the federal procurement system, which the opinion below has seriously undermined.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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